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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, APPELLANT

v.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The only previous opinion in this case is that of the District Court (R. 13–26) which is reported in 59 F. Supp. 483.

JURISDICTION

The judgment of the District Court was entered on March 7, 1945. (R. 12–13.) A motion was filed by the United States on March 9, 1945, to amend the findings of fact and conclusions of law and to correct the amount of the judgment. (R. 26–27.) On March 13, 1945, this motion was de-

nied except as to the correction of the amount of the judgment. (R. 27–28.) The petition for appeal was filed on March 30, 1945, and was allowed by the District Court on March 31, 1945. (R. 28–29.) This Court noted probable jurisdiction on May 7, 1945. (R. 33.) The jurisdiction of this Court rests upon Section 2 of the Act of August 23, 1937, c. 754, 50 Stat. 751.

QUESTION PRESENTED

Whether Section 402 (b) (2) of the Revenue Act of 1942 is unconstitutional.

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES INVOLVED

The constitutional provisions, federal statutes and Treasury Regulations involved are set forth in Appendix A of the Government's brief in *Fernandez* v. *Wiener*, No. 58. Excerpts from the relevant committee reports are set forth in Appendix B of our brief in the *Wiener* case.

The Texas statutory provisions relating to community property are set forth in the Appendix hereto, *infra*, pp. 19–25.

STATEMENT

This is an action brought by the administrator of the estate of Ernst Herbst for the recovery of an alleged overpayment of federal estate taxes upon the estate of Herbst. The case was submitted upon the pleadings and a stipulation of facts. (R. 9, 14.) The facts as thus disclosed may be summarized as follows:

Decedent was married on February 12, 1901, and died on November 17, 1943, leaving surviving his wife, their child, and grandchildren. (R. 4, 9.) From the date of marriage on February 12, 1901, until 1934, decedent's principal business activity was that of raising livestock or ranching which was conducted on a ranch in Comal County, Texas. Decedent and his wife lived on this property during the greater portion of their married life. It was acquired largely on the credit of and paid for out of savings from his ranching business. The residue was saved and invested from time to time. (R. 10.)

In 1934, the decedent and his wife moved from their ranch to the town of New Braunfels, Texas, where they lived until the decedent's death. After this move the ranch was rented to the decedent's son-in-law at an annual rental of approximately $900 per year. In addition to this rental approximately $200 a year was received for hunting leases upon this ranch. After moving to New Braunfels, the decedent confined his business activities to making loans and investments out of the aforesaid savings and receipts and to attending thereto. (R. 11.)

On October 20, 1937, the decedent inherited from his brother an undivided one-seventh interest in certain ranch land in Kinney County, Texas. Thereafter decedent rented his interest at an annual rental of approximately $400. These rentals he deposited in the bank account in which

he deposited receipts from all other sources and from which all personal and family expenses were paid as well as all business expenses and the cost of investments. The decedent did not segregate or maintain the identity of these rental receipts. (R. 11.)

During their marriage neither the decedent nor his wife was ever employed by anyone at a wage or salary and neither received during that time any commissions, fees, or similar compensation for services rendered to another. (R. 11.) At the time of his death the decedent's separate property consisted of the undivided one-seventh interest inherited from his brother in the ranch in Kinney County, Texas, valued at $12,831.20. The community property of the decedent and his surviving wife totaled $102,783.99. (R. 10.) All of the community property represented accumulations from the business of raising livestock and rentals, interest and dividends on properties acquired with those savings, except to the extent that the rentals derived from the decedent's one-seventh interest in the ranch property in Kinney County, Texas, may have gone into these investments. (R. 11.)

In the estate tax return filed with respect to the Herbst estate, only one-half of the value of the community property was reported. A deficiency was determined upon the ground that there should have been included in the gross estate the full

value of all of the community property. (R. 4–5, 9.) The deficiency was paid, and following rejection of a claim for refund this action was begun. (R. 3, 8.) The District Court held that the amendments made to Section 811 of the Internal Revenue Code by Section 402 (b) of the Revenue Act of 1942 are unconstitutional (R. 13–26) and entered judgment for the plaintiff (R. 12–13, 27–28).

As has been noted, the case was submitted upon the pleadings and a stipulation of facts and the court below found (R. 14) "as the facts," which it incorporated in its opinion by reference, "the allegations of fact contained in the complaint, to the extent they were admitted by defendant's answer, and the additional facts contained in the written stipulation filed herein by the parties". Nowhere in the pleadings or in the stipulation is there any statement that the decedent's wife contributed any personal efforts to the building up of the community estate. Nevertheless the court's opinion stated that the community estate (R. 14) "as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife". It stated further (R. 19) that "It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate". The Government there-

upon filed a motion (R. 26–27) which pointed out that the statements were without any basis in the Record and requested the court to eliminate them from the opinion. The motion was denied without opinion. (R. 27–28.)

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors appears at R. 28–29. The first four may be summarized by the statement that the court below erred in holding that Section 402 (b) of the Revenue Act of 1942 is unconstitutional. The fifth assignment is directed to the suggestion in the opinion below that the community property here involved was acquired through the joint work of both the decedent and his wife.

ARGUMENT

This is a companion case to *Fernandez* v. *Wiener*, No. 58. We respectfully refer the Court to our discussion of the constitutional questions in our brief in the *Wiener* case and shall confine this brief to matters not dealt with therein.

1. The wife's interest under Texas community property law

As in Louisiana, the Texas wife's interest in the community property consists chiefly of the right to receive a portion of the property in existence at the time of dissolution of the community. *First Nat. Bank of Brownwood* v. *Hickman*, 89 S. W. 2d 838 (Tex. Civ. App.). Either spouse

may dispose of half of the property by will and the survivor will take the other half. Speer, Law of Marital Rights in Texas (Third Ed.), Sec. 315. Unlike the Louisiana wife, the Texas wife has no right to a fixed share in the event of divorce, the statutes authorizing the court to divide the property in such way as shall seem "just and right, having due regard to the rights of each party and their children, if any". Article 4638, Vernon's Texas Civil Statutes, Appendix, *infra; Hedtke* v. *Hedtke,* 112 Tex. 404; Speer, Law of Marital Rights in Texas (Third Ed.), Sec. 627. Nor is there any provision whereby she can, in any circumstances, obtain a separation of property without securing a divorce. Cf. *Gonzales* v. *Gonzales,* 117 Tex. 183.

During the existence of the community[1] the husband has in general the sole right to deal with and dispose of the property (Article 4619, Appendix, *infra; Cushenberry* v. *Profit,* 153 S. W. 2d 291 (Tex. Civ. App.)), and the wife's joinder or consent is unnecessary (*Cates* v. *Green,* 114 S. W. 2d 592 (Tex. Civ. App.); *Griffin* v. *Troup Independent School Dist.,* 163 S. W. 2d 412 (Tex. Civ. App.)). The Supreme Court of Texas has re-

[1] In Texas the spouses cannot by contract, either ante- or post-nuptial, agree that the community property system shall not apply. But after the property has come into being it may be converted by gift into the separate property of one of them. *Strickland* v. *Wester,* 131 Tex. 23. *Myles* v. *Arnold,* 162 S. W. 2d 442 (Tex. Civ. App.).

ferred to his control over the property during marriage as "absolute", adding that "barring any disposition made with intent to defraud her, he may sell, barter, or give it away". *Moody* v. *Smoot*, 78 Tex. 119, 123. More recently it has been said with respect to her "equal" interest in the community property (*McJunkin* v. *Republic Nat. Bank of Dallas*, 131 S. W. 2d 1085, 1089 (Tex. Civ. App.)):

> * * * her right is passive; his is active, and Texas Jurisprudence gives him the absolute control and disposition of the property. The husband has, and usually does exercise dominion over the entire property.

See also *Locke* v. *Locke*, 143 S. W. 2d 637 (Tex. Civ. App.).

Ordinarily the husband has the sole right to bring actions on behalf of the community property, even including actions for damages for personal injuries to the wife (*Roberts* v. *Magnolia Petroleum Co.*, 142 S. W. 2d 315 (Tex. Civ. App.), writ of error refused, 135 Tex. 289), and even where the action is to recover upon an obligation arising out of a business conducted by the wife (*Gist* v. *Tsesmelis*, 153 S. W. 2d 277 (Tex. Civ. App.)). In actions involving the community property the wife is not a necessary party and a judgment against the husband will conclude her even though she is not a party. *Starr* v. *Schoellkopf Co.*, 131 Tex. 263. This is true whether the

husband is plaintiff or defendant, and even where he has abandoned her. *Hall* v. *Aloco Oil Co.,* 164 S. W. 2d 861 (Tex. Civ. App.).

Except for that part of it which consists of her personal earnings or the income from her separate real estate, bonds, notes and stocks (Article 4616, Appendix, *infra*), all of the community property is subject to his debts (*Ochoa* v. *Edwards,* 189 S. W. 1022 (Tex. Civ. App.), writ of error refused, 196 S. W. XV; *Lovejoy* v. *Cockrell,* 63 S. W. 2d 1009 (Tex. Comm. App.)), and may be sold to satisfy a judgment against him alone (*Hornsby* v. *Hornsby,* 127 Tex. 474, 478; *Cowan* v. *N. O. Nelson Mfg. Co.,* 34 S. W. 1045 (Tex. Civ. App.); *Seabrook* v. *First Nat. Bank,* 171 S. W. 247 (Tex. Civ. App.)). Even that part of the community property which by Article 4616 is declared not to be subject to the payment of debts contracted by the husband (her earnings and the income from her separate real estate, bonds, notes, and stocks), is subject to debts contracted by him when it has been converted into other property. *Strickland* v. *Webster,* 131 Tex. 23.

Aside from her right to an injunction to prevent the husband's disposition of the property during the pendency of divorce proceedings (Article 4635, Appendix, *infra*), she may interfere with his disposition of the community property only upon a showing that he intended to defraud her. Thus, in the absence of a showing of an intention

to defraud her, his power even to give the community property away has been sustained. *Dunn* v. *Vinyard,* 234 S. W. 99 (Tex. Civ. App.), affirmed, 251 S. W. 1043 (Tex. Comm. App.); *Shaw* v. *Shaw,* 28 S. W. 2d 173 (Tex. Civ. App.). See Huie, Community Property Laws as Applied to Life Insurance, 18 Tex. L. Rev. 121, 126 (1940).

Her powers with respect to the property are in comparison very narrow. They are limited first by the fact that the common law disabilities of coverture still exist to a substantial extent in Texas. Except as there have been statutory modifications in specific instances, a married woman has no power to contract. To the extent that she is empowered to manage her separate property,[2] or the community property, she has implied power to contract for such expenses as are incidental to that management. She may also contract for necessaries for herself and her children. And she can, when joined by her husband, be a joint maker of a note or surety on an obligation of another. But except in these specific respects she cannot incur any personal liability for debts. *Lee* v. *Hall Music Co.,* 119 Tex. 547; *Keith* v. *Allen,* 153 S. W. 2d 636 (Tex. Civ. App.). Thus she is without capacity to execute a note as a renewal of an obligation incurred by her prior to

[2] She is entitled to manage her separate property except that the husband must join in conveyances of real estate and in transfers of stocks and bonds. Article 4614, Appendix, *infra.*

marriage (*John F. Grant Lbr. Co.* v. *Jones,* 139 Tex. 647), and she cannot be held liable as an individual underwriter on a contract of insurance (*Harris* v. *Prince,* 132 Tex. 231). Her capacity to contract for necessaries is limited to those for herself and children. It does not extend to necessaries for the husband. Therefore she is not liable on a note executed jointly with her husband in payment of a truck which was purchased by him to use in order to support and maintain the family. *Humbles* v. *Hefley-Stedman Motor Co.,* 127 S. W. 2d 515 (Tex. Civ. App.). And she is not liable for medical services rendered to her husband even though they were rendered at her request. *Petersen* v. *Berry,* 99 S. W. 2d 1025 (Tex. Civ. App.). Nor can she contract so as to make herself personally liable for the purchase money of real estate. *Loan Assn.* v. *Abernathy,* 129 Tex. 379.

With respect to community property she may in general charge it for debts only for necessaries. Articles 4621 and 4623, Appendix, *infra.* Conversely, neither she nor her separate estate is liable for community debts. *Lusk* v. *Parmer,* 114 S. W. 2d 677 (Tex. Civ. App.). In special circumstances, as where the husband is disabled from managing the property because of imprisonment or insanity, she may manage the property in order to preserve it. *Ulmer* v. *John Hancock Mut. Life Ins. Co.,* 161 S. W. 2d 862 (Tex. Civ.

App.). When he has abandoned her and she is not at fault, she may sue on behalf of the community. (*Crowder* v. *Crowder,* 111 S. W. 2d 1161 (Tex. Civ. App.); *Savage Oil Co.* v. *Johnson,* 141 S. W. 2d 994 (Tex. Civ. App.)), and she may sue for damages for personal injuries to herself if he refuses to bring suit. (*Dixie Motor Coach Corp.* v. *Watson,* 138 S. W. 2d 314 (Tex. Civ. App.)). She may also manage or dispose of the community property for the support of herself and her family where he has abandoned her, but this does not mean that her power of disposition supplants his, for despite the abandonment he nevertheless possesses a concurrent power of disposition. *Hall* v. *Aloco Oil Co.,* 164 S. W. 2d 861 (Tex. Civ. App.).

Where they have been separated and living apart for many years she may bring an action to cancel his conveyances of community property when the object of the action is to prevent dissipation of the property and to protect her interests therein (*Mahoney* v. *Snyder,* 93 S. W. 2d 1219 (Tex. Civ. App.)), and he may not make a gift of the property if his purpose is to defraud her. He is prohibited from contracting debts on account of the community after institution of a suit for divorce and any alienation of lands made by him after that time may be set aside if shown to have been "made with a fraudulent view of injuring the rights of the wife". Article

4634, Appendix, *infra*. *Moore* v. *California-Western States Life Ins. Co.*, 67 S. W. 2d 932 (Tex. Civ. App.); *Aaron* v. *Aaron*, 173 S. W. 2d 310 (Tex. Civ. App.).

As in Louisiana the rights of the parties rest upon a fictional basis for they do not depend upon an actual discharge of the marital duties. The community continues even though they have been separated (*Kearse* v. *Kearse*, 262 S. W. 561 (Tex. Civ. App.), affirmed, 276 S. W. 690 (Tex. Comm. App.)), and the husband's community interest in the wife's earnings continues even though he abandons her and fails to contribute to her support (*Carter* v. *Barnes*, 25 S. W. 2d 606 (Tex. Comm. App.)).

It is interesting to observe that the Texas law makes a distinction between classes of community property according to their source, a distinction very similar to that made by the federal statute. In Texas the wife was from 1913 to 1925 entitled to manage that part of the community property which consisted of her personal earnings and the income from her separate lands, bonds, notes and stocks. Speer, Law of Marital Rights in Texas (Third ed.), Sec. 347. Although the management of that part of the property is now vested in the husband, it is still provided that it shall not be subject to debts contracted by him, or to liability for his torts. Article 4616. And conversely, it is provided that no part of the community property

other than her earnings and the income from her separate lands, bonds, notes and stocks, shall be liable for debts contracted by her, except for necessaries furnished her or her children. Articles 4621, 4623. See *Foster* v. *Hackworth*, 164 S. W. 2d 796, 798 (Tex. Civ. App.).

2. The references by the court below to the efforts of the decedent's wife in building up the community estate

We are somewhat in doubt upon the question whether these references by the court below were intended as findings of fact or as conclusions of law. It was agreed that the case would be submitted upon the pleadings and stipulation of facts (R. 9), the case was so submitted, and the court found "as the facts" (R. 14) those which were disclosed by the pleadings and the stipulation. Since neither in the pleadings nor in the stipulation was there any intimation that the community property was in any degree attributable to the efforts of the decedent's wife, it might be thought that the court below did not intend its references to her alleged efforts to be findings of fact. This interpretation also follows from the fact that the references do not appear as part of a separate statement of facts as is required by Rule 52 of the Federal Rules of Civil Procedure and it ought not to be presumed that the rule was violated by the District Court. On the other hand the references have the sound of findings of fact since they deal wholly with factual matter. Whether

the wife contributed any efforts at all toward the accumulation of the community property, or if she did contribute any, what was their scope and extent, are pure matters of fact; they are hardly questions of law. But whether the statements were intended as findings of fact or conclusions of law, they are supportable only if they have some basis in the record, and we submit that they are completely without any such foundation.[3] Indeed, so far as the record shows, the wife may not have performed even the household duties.

In this connection we think it proper to add that the absence of any such basis in the record

[3] We construe the court's first statement (R. 14) as meaning that there is a general custom whereby a Texas wife contributes personal services which build up the community estate, and the second statement (R. 19) as a more qualified assertion as to the supposed custom, though it is difficult to say what limitation was intended by the use of the phrase "husbands and wives situated as were the decedent and his wife," since the record shows nothing as to the situation of decedent and his wife in reference to this matter. We gravely doubt that such a general custom exists, or, if it does exist, that it is so notorious or universally understood and accepted that the court below was warranted in assuming that the matter could be judicially known. *Minnesota* v. *Barber*, 136 U. S. 313; American Law Institute, Model Code of Evidence (1942), Rule 802. Moreover, if such a general custom did exist, it would afford no basis for the court to conclude that in this particular case the joint work of the spouses contributed to the community estate, nor would it, in the absence of supporting evidence in the record, justify the court in arriving at such a conclusion on the basis of "common knowledge." *First Nat. Bank* v. *Anderson*, 269 U. S. 341; *Ohio-Bell Tel. Co.* v. *Commission*, 301 U. S. 292; *Timson* v. *Manufacturers Coal & Coke Co.*, 220 Mo. 580.

for the court's statements was not the result of mere oversight. At the time when the stipulation was entered into between the parties, the appellee suggested that it include a statement similar in import to those which the court below made and submitted affidavits in support thereof. The Government declined to agree to this upon the ground that it was, at that time, without knowledge as to the facts and it would be necessary to conduct an investigation in order to ascertain them. The appellee thereupon agreed that that statement be eliminated from the stipulation. This, however, still left the possibility that the appellee might at the trial offer evidence in an attempt to show such facts and it would therefore still have been necessary for the Government to conduct an investigation in order to be prepared to meet that issue. The appellee, being desirous of securing a trial at the earliest possible time, submitted a revised stipulation eliminating therefrom any reference to the activities of the wife in the production of community property and providing in the last sentence in paragraph one thereof, "It is stipulated that this cause shall be submitted on this agreed statement of facts and the pleadings." (R. 9.) The Government consented to an early trial inasmuch as the stipulation eliminated any such question from the case and obviated the necessity of an investigation by the Government. The references by the court below to this subject are, therefore, particularly unjustifiable in the

light of the steps which were taken to eliminate this issue from the case.[4]

The matter would probably not deserve detailed attention if it did not form the basis for a series of unwarranted assumptions by the court below, from which it then concluded that the statute imposes impossible burdens of proof. (R. 19.) Having made the unjustifiable assumption that the wife here contributed services to the accumulation of the community property, the court then made the further assumption that those services were not capable of being evaluated. But as this Court has held (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 352), "Impossibility of proof

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[4] A court may not, by the use of judicial notice, raise and decide an issue which the parties have not presented. "* * * the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge." *Mountain View Min. & Mill. Co.* v. *McFadden*, 180 U. S. 533, 535. Accord: *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185, 190; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 312. See American Law Institute, Model Code of Evidence (1942), Rules 803, 804. Cf. *First Nat. Bank* v. *Anderson*, *supra*, p. 354. And, since it is only the function of judicial notice to relieve a party from making proof by the usual forms of evidence, its use should not be availed of to prevent his opponent from disputing a matter which is capable of contradition. *Ohio Bell Tel. Co.* v. *Commission*, *supra*, pp. 301–302. See also, *State* v. *Kincaid*, 133 Ore. 95, 103–104. Nor should judicial notice be taken of a matter which is actually disputed by one of the parties. *State ex rel. Huff* v. *Reeves*, 5 Wash. 2d 637.

may not be assumed." And as we have pointed out in our brief in the *Wiener* case (p. 55) such an issue could arise only after a claim was made that some part of the property was attributable to her efforts, all available facts had been submitted in substantiation of the claim, and the claim had nevertheless been rejected. Not only was no such claim made in this case, but no such issue was before the court.

CONCLUSION

The judgment of the District Court is erroneous and should be reversed.

Respectfully submitted,

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SEPTEMBER, 1945.

APPENDIX

Vernon's Texas Civil Statutes, Vol. 18:

ART. 4613. *Husband's separate property.*—All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal.

ART. 4614. *Wife's separate property.*—All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. The wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and

bonds belonging to her or of which she may be given control by this law.

ART. 4615. *Compensation for personal injuries to wife.*—All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

ART. 4616. *Wife's separate property protected.*—Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband.

ART. 4617. *When wife may convey, etc.*—If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder.

In event the wife is a non-resident, she may apply to the district court of the county where the property, or a portion thereof, is situated, and the court shall hear

and determine such application and grant relief the same as if the applicant were a resident of this State.

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ART. 4619. *Community property.*—SEC. 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a femme sole.

SEC. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a nonresident of this State at the time of disappearance, or of any

county in which the community property or part thereof is situated in which petition the wife shall set forth the facts entitling her to control, manage and dispose of the community property under the provisions of this article.

SEC. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

SEC. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall be not less than ten days prior to such date set for such hearing.

SEC. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage and dispose of the community property under the provisions of Section I of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said

petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be recorded in the deed records of other counties in which the property of said community estate may be situated.

ART. 4620. *Community property liable for debts.*—The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law.

ART. 4621. *Community property not liable.*—The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision.

ART. 4622. *Funds in bank.*—Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

ART. 4623. *Subject to debts of wife.*—Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to

the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.

ART. 4624. *Judgment and execution.*—Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff.

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ART. 4634. *Debts created after suit.*—On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

ART. 4635. *Inventory and appraisement.*—At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restrain-

ing him from disposing of any part thereof in any manner.

ART. 4636. *Temporary orders.*—Pending suit for a divorce the court, or the judge thereof, may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable.

ART. 4637. *Alimony.*—If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case.

ART. 4638. *Division of property.*—The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

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